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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

LOUIS LUPO,

Petitioner,

vs.

THE NORFOLK & WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO.

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OPINIONS BY COURTS BELOW.

Petitioner, Louis Lupo, respectfully prays that a writ of certiorari issue to the Court of Appeals for Franklin county, Ohio, to review the judgment and decision of that court in Case No. 5303, entitled Louis Lupo v. Norfolk & Western Railway Company, a corporation, which court in an unreported per curiam opinion dated February 2, 1956, (App. B) affirmed the judgment of the Court of

Common Pleas for Franklin county, Ohio. The said Court of Common Pleas for Franklin county, Ohio, entered judgment for respondent pursuant to a verdict directed for respondent at the close of the petitioner's evidence. The unreported statement of the trial court in directing the verdict is appended to this petition (App. A).

JURISDICTION OF THIS COURT.

The entry of the judgment of the Court of Appeals for Franklin county, Ohio, of which review is sought was dated February 29, 1956, (App. C). On March 23, 1956, the Court of Appeals for Franklin county, Ohio, denied petitioner's motion to certify the case to the Supreme Court of Ohio for review on the alleged ground that the decision was in conflict with a decision of another Ohio Court of Appeals. On June 6, 1956, the Supreme Court of Ohio entered an order denying petitioner's motion made in that court to certify the record for review (App. D).

Under the Ohio Constitution the only available basis in the instant case for mandatory jurisdiction to review by the Ohio Supreme Court was the certification of a conflict by the Court of Appeals, which petitioner sought and was denied. Constitution of Ohio, Article IV, Section 6.

Following such denial by the Franklin county Court of Appeals, petitioner had no appeal as a matter of right to the Ohio Supreme Court. Review by that court was discretionary upon the ground that the case was one "of public or great general interest." Constitution of Ohio, Article IV, Section 2. This review was sought by petitioner by a motion to certify the record and was denied by the Ohio Supreme Court. That denial constituted a refusal by that court to exercise its discretionary power to review and was merely a finding that the case was not one "of public

or great general interest." The denial did not constitute an affirmance of the judgment of the Court of Appeals and was not a decision upon the merits. *Village of Brewster v. Hill*, 128 Oh. St., 343, 352, 353; *The Swetland Co. v. Evatt, Tax Commissioner*, 139 Oh. St., 6, 18 (paragraph 2 of syllabus); *Keesecker, a Minor, v. The B. M. McKelvey Co.*, 141 Oh. St., 162, 169 (paragraph 3 of syllabus).

Under the law of Ohio, therefore, the judgment of the Court of Appeals for Franklin county, Ohio, became the final judgment of the highest court of the state of Ohio in which a decision could be had. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S., 300, 37 S. Ct., 653.

Jurisdiction of this court to review the said judgment of the Court of Appeals for Franklin county, Ohio, by writ of certiorari is, accordingly, conferred upon this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat., 929, Title 28, U. S. C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * * * * * * * *
>
> "(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. In this action arising under the Federal Employers' Liability Act was the Court of Appeals for Franklin county, Ohio, correct in affirming the trial court's directed verdict and judgment for the respondent railroad, which was based upon the court's finding that as a matter of law there was no issue of negligence for the jury, when all the

evidence in petitioner's case is considered in conformity with the decisions of this court?

2. In an action under the Federal Employers' Liability Act should a railroad company be absolved from liability as a matter of law because an injury to an employee was caused by his slipping on ice and snow covering a tie in the railroad's yard where the slippery conditions had existed for at least two days prior to the injury and the railroad had made no attempt to do anything about those conditions and where the railroad knew from long established custom that the injured employee in the course of his duties would be and was required to go from a fixed place, the railroad's roundhouse, to a distant fixed place on an outside track in the yard and then return to the roundhouse, all of which required him to cross over various intervening tracks covered with ice and snow while he was carrying tools, grease and other supplies?

3. In an action under the Federal Employers' Liability Act should the railroad company be absolved from liability as a matter of law where petitioner's evidence, in addition to the circumstances stated in Question No. 2, raises a reasonable inference that the job which petitioner was required to perform, namely, the servicing of a yard locomotive, could have been done in the roundhouse or on a track close to the roundhouse, thereby eliminating the petitioner's trip to and from the distant outside track in the yard?

STATUTES INVOLVED.

Involved in this review is the Federal Employers' Liability Act. Title 45, U. S. C., Sections 51 and following. Particularly pertinent to the central issue in this review is Section 51 of that Act, Title 45, U. S. C., Section 51, which provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

Also involved is Section 54 of that Act dealing with assumption of risk, Title 45, U. S. C., Section 54, which provides as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

The jurisdiction of the federal claim by the state court is provided in Section 56 of the Act, Title 45, U. S. C., Section 56, which provides as follows:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Court of Common Pleas, Franklin county, Ohio. Petitioner alleged in the first 11 lines of his petition and amended petition:

> "For his cause of action herein plaintiff says that defendant is a railroad corporation organized and existing under the laws of the state of Virginia; that said defendant owns and operates in interstate commerce a line of railroad extending through several states and into Ohio; that at Columbus, Ohio, defendant has at all times herein owned, maintained and operated in conjunction with and as part of said interstate line of railroad certain tracks, yards and facilities in and near Columbus, Ohio.
>
> On and about January 31, 1951, defendant corporation employed plaintiff as a roundhouse and engine supply man at said location."

These allegations were admitted by respondent in its answer as indicated by the first 9 lines therein:

> "The defendant admits that it is a corporation organized and existing under the laws of the State of Virginia, the defendant admits that it owns and operates in interstate commerce a line of railroad extending through several states and into Ohio; the defendant admits that it operates and maintains certain tracks, yards and facilities as a part of said interstate line of railroad in and near Columbus, Ohio, and admits that on or about January 31, 1951, plaintiff was employed by defendant as an engine supply man."

At the trial counsel for petitioner and respondent stipulated that at the time of the pertinent accident and injury, both petitioner and respondent were engaged in interstate

commerce, as shown by the following excerpt from the bill of exceptions (R., 3, 4):

> "Mr. Dombey: Now, we stipulate first that at the time of the accident both plaintiff and defendant were engaged in interstate commerce.
>
> Mr. Barton: That is agreeable."

The action involved in this review, accordingly, was pleaded and tried under the Federal Employers' Liability Act, Title 45, U. S. C., Sections 51 and following. From the inception of the action, therefore, the case involved a federal claim arising under statutes passed by Congress.

At the trial the following evidence presented in petitioner's case was uncontradicted. Plaintiff was employed by defendant on the pertinent date, January 31, 1951, as an engine supply man with the duty of servicing locomotives in defendant's facilities located at Columbus, Ohio (R., 82). At that place, defendant maintained a railroad roundhouse, yard tracks and other facilities (R., 56-57). In that yard there were, among others, an inspection or service track with pit close to the roundhouse (R., 8, 56) and a penstock track located approximately 100 yards or 300 feet from the roundhouse (R., 56, 67). The supply house where plaintiff and other supply men obtained their supplies was adjacent to the roundhouse (R., 18; identified as "Y" on Defendant's Exhibit 3).

The weather conditions for at least two days prior to January 31, 1951, were extremely bad (Plaintiff's Ex. A. R., 4, 114). That exhibit reveals that on the day before the accident involved herein the conditions were described as very slippery. It also shows that on January 30 and continuing in the early morning of January 31 it had been snowing and that freezing rain commenced to fall at 1:46 p. m. and continued thereafter. Plaintiff's foreman, Arthur

Wooten, had knowledge of the weather conditions exist- at that time (R., 54-55). Indeed, when plaintiff re- ted to work at 3:00 p. m. in the afternoon, the yard s covered with snow and ice, and snow and freezing rain re falling at the time (R., 11, 20, 86).

n spite of the foregoing weather conditions defendant's eman, Wooten, directed plaintiff to service locomotives the distant penstock track (R., 83, 102). In order to from the roundhouse and supply house to the penstock ck, it was necessary for plaintiff and his co-employee, ark, to cross several tracks, at least a half dozen (R., 57, 34, 44). Plaintiff and his co-employee, Clark, had carry tools, including buckets of oil and grease and ier equipment to and from the locomotive which was to serviced (R., 36, 84).

After the locomotive had been serviced at the distant nstock track, plaintiff upon his return and in crossing e of the several tracks slipped on the ice and snow cover- g a tie and fell backwards, and was hurt (R., 84-87, 36,).

No salt or abrasive was spread upon any part of the ea involved (R., 75).

The locomotive to be serviced was a "doubling over" comotive which was to be serviced at the end of one shift d to be put back into service in the yard in the next shift R., 13). From a reading of the evidence it is clear that was the longstanding custom of respondent to require at such "doubling over" locomotives be serviced at that rticular point on the penstock track. There is a conflict the evidence as to whether such "doubling over" locomo- ves were at all times serviced on the penstock track. here is testimony to the effect that such locomotives were rviced in the roundhouse in the case of an emergency,

hard rain or adverse weather conditions (R., 39, 47, 88). Respondent's foreman, however, testified that "doubling over" locomotives were always serviced at that particular point on the penstock track (R., 57, 58, 59, 60).

A reading of the entire record, however, will show that irrespective of what respondent did as a matter of practice, the locomotives could have been serviced either in the roundhouse or on the inspection track close to the roundhouse.

In the face of the foregoing evidence the trial court directed a verdict for respondent at the close of petitioner's case (R., 116-119). In its statement to the jury in connection with the directed verdict (App. A), the trial court on the one hand limited its consideration of the issue of negligence to the matter of ice and snow; yet, on the other hand, enlarged the area to be considered to include the whole railroad yard. The Court of Appeals for Franklin county, Ohio, in a per curiam opinion affirmed the judgment of the trial court without giving any reason therefor (App. B). The Court of Appeals also denied petitioner's motion to certify the case to the Ohio Supreme Court which motion was made on the ground that a conflict existed between the instant decision and the decision of another Ohio Court of Appeals. Subsequently on June 6, 1956, the Ohio Supreme Court denied petitioner's motion to certify the record for review by that court, which motion was made on the ground that the case was one of "public or great general interest" (App. D).

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ARGUMENT.

Summary.

In this action arising under the Federal Employers' Liability Act, petitioner's right to have issues of fact tried by the jury was denied to him by the state courts.

Underlying the directed verdict in this case was the concept of the courts below that a railroad as a matter of law may not be charged with an injury where adverse weather conditions such as ice and snow in the railroad yard are involved in the cause of the injury. That concept is in conflict with the decision of this court in the recent case of *Schulz, Administratrix, v. Pennsylvania Railroad Company*, 350 U. S., 523, wherein this court held that the presence of a coating of ice at and about the work place of the petitioner did constitute a basis for an issue of negligence for the jury. The lower court's decision in the instant case, moreover, is in direct conflict on facts with those of two United States Circuit Courts of Appeals. *Fort Worth & Denver City R. Co. v. Smith*, 206 Fed. 2d, 667 (C. C. A., 5); *Anderson v. Elgin Joliet & Eastern R. Co.*, 227 Fed. 2d, 91 (C. C. A., 7).

The courts below also violated or ignored well-known and long established general principles set forth in decisions of this court. First of all, the state courts failed to consider and to construe all the evidence to ascertain whether there was evidence of any probative value to support a finding of negligence on the part of respondent. Secondly, the trial court seized upon one aspect only, namely, the presence of ice and snow in the railroad yard, and excluded all other evidence in the record. Thirdly, the trial court indulged in some gross speculation of its

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own in enlarging the scope of inquiry to irrelevant situations covering the entire railroad yard where the evidence was undisputed and clear that the petitioner was required to and ordered to go *from an inside fixed place to another fixed place in the yard* and to return, and that such fact was known to respondent through years of established practice. In short, the state courts (1) failed to apply the test set forth in the case of *Lavender v. Kurn*, 327 U. S., 645, to determine whether there was evidence of any probative value to support a finding of negligence; (2) failed to consider all the facts and circumstances as a whole as required by the rule of unitary negligence in *Union Pacific Co. v. Hadley*, 246 U. S., 330; *Bailey v. Central Vermont Ry. Co.*, 319 U. S., 350; *Blair v. Baltimore & Ohio R. Co.*, 323 U. S., 600; and (3) indulged in speculation outside of and indeed in conflict with the record, thus invading the province of the jury in violation of a long series of decisions of this court, the most recent of which was that in the case of *Schulz, Administratrix, v. The Pennsylvania R. Co.*, 350 U. S., 523.

Finally, the trial court, and apparently the Ohio Court of Appeals, completely ignored the fact that petitioner was required to make the trip to and from the locomotive on the outside track when that locomotive could have been serviced on a nearby track or in the roundhouse; thus the courts below refused to recognize numerous decisions by this court and others that an issue of negligence is made for the jury where there is evidentiary basis for a finding that a safer means of doing the job is available.

The holding of the trial court, affirmed by the Court of Appeals for Franklin county, Ohio, is another attempt to carve out a judicial exception to an injured employee's right to a trial by jury under the Federal Employers' Liability Act. This court in the recent *Schulz* decision em-

phasized again the importance of that right guaranteed by the Seventh Amendment, and should accordingly grant writ of certiorari and restore to petitioner that fundamental and constitutional right.

Questions Nos. 1 and 2.

In directing the verdict for respondent, the trial court stated to the jury (R., 116, 117):

> "Now, this action is predicated upon the claim that the Railroad Company was negligent in permitting the ice to form and negligent in not removing it. I think, knowledge will prompt everyone to the conclusion that it is impossible for the Railroad Company or any other organization to prevent the formation of ice on its property.
>
> To allow recovery in this case would either require that the Railroad Company would have to cease operation when there was ice or they would have to compensate everyone who might be injured. Here is a large area of yards, all of it covered with ice and all of it practically traversed by the many employees there, not only that, but the railroads operating throughout the country, and we all know, I think that very often trains are stalled on the tracks and a brakeman has to get out and walk back. Now, if they were required to compensate every one that might slip on the ice and be injured, that would mean that they would have to insure over their whole line of travel."

It is apparent from the foregoing that the trial court blandly overlooked or refused to recognize the following uncontradicted evidence:

(1) The railroad yard had been slippery and dangerous for at least two days prior to the accident, and the very area that the respondent knew petitioner would be required to cross was in such a condition when he reported for work.

(2) From long established practice the respondent, including its foreman, knew that petitioner and others were

required to go from a fixed place, the roundhouse, to a fixed place on the penstock track to service yard locomotives and then to make the return trip to the roundhouse.

(3) The respondent, including its foreman, moreover, knew that in making this trip, petitioner would be required to carry tools and buckets of grease or other supplies, thus increasing the hazards of crossing over ties and rails covered with snow and ice.

(4) With such knowledge respondent directed petitioner to service the yard locomotive at the outside penstock track without even attempting to do anything about the snow and ice or to provide petitioner a safe or safer access to and from the locomotive.

In place of giving credit to the foregoing evidence as it was required to do, the trial court extracted from the record the elements of weather, namely, the presence of ice and snow in the yard. From that limited view of the evidence the court reached the conclusion that a railroad as a matter of law cannot be charged with the consequences of the presence of ice or snow and its failure to remove or to take other precautions against such elements. Although such limited treatment of the evidence was clearly wrong, still the trial court's conclusion conflicted with at least three recent decisions, one by this court and two by United States Circuit Courts of Appeals. In the case of *Schulz, Administratrix, v. Pennsylvania R. Co.*, 350 U. S., 523, this court held that where there was an evidentiary basis for a jury inference that an employee was sent to work on tug boats covered with ice, an issue of negligence on the part of the employer was presented for the jury. Here, of course, there was direct, positive and uncontradicted proof that petitioner was sent to work over a known slippery and icy area burdened with tools, grease and supplies.

The lower court's decision in this case, moreover, cannot be reconciled with those in the cases of *Fort Worth & Denver City R. Co. v. Smith*, 206 Fed. 2d, 667 (C. C. A., 5), and *Anderson v. Elgin, Joliet & Eastern Ry. Co.*, 227 Fed. 2d, 91 (C. C. A., 7). Indeed in the *Smith* decision an issue of negligence for the jury was held to be presented where the only evidence of negligence was ice in the yard where the employee was found dead. In the *Anderson* decision, involving a huge yard with 210 miles of track and 1600 switches and involving inclement weather that started late in the night before the accident and continued right up to the next morning at the time of the accident, the court nevertheless held that a jury question was presented as to whether the railroad should have taken the steps to remove the ice or to make the premises safer so as to avoid the fall of a brakeman on the ice near one of the switches. It is also noteworthy that in that case the railroad itself conceded that it had a duty to remove the snow and ice or to spread abrasives, and its argument was based upon the premise that it was doing so at the earliest possible time. This is quite different from the lower court's position in the instant case that even though the snow had existed for two days prior to the accident, it would be preposterous to require the railroad to remove the snow and ice from the area involved, or to take any steps to make the work place safer.

A further convincing point is made in the *Anderson* opinion concerning the decision of this court in the case of *Missouri Pacific Railroad Co. v. Aeby*, 275 U. S., 426. The United States Court of Appeals soundly concluded that the *Aeby* decision was based upon assumption of risk and had consequently been overturned by the 1939 amendment to the Federal Employers' Liability Act, Title 45, U. S. C., Section 54, and by this court's subsequent deci-

sion in *Tiller v. Atlantic Coastline R. Co.*, 318 U. S., 54. In other words, the *Anderson* opinion in accordance with this court's decision denied the application of assumption of risk under some other name, such as non-negligence.

The statement of the trial court quoted supra reveals a complete failure or refusal to abide by fundamental principles set forth by this court. One element, the presence of ice and snow, was plucked from the record; the other evidence was ignored. That is precisely what this court has said may not be done by a court. *Union Pacific Co. v. Hadley*, 246 U. S., 330; *Bailey v. Central Vermont Ry. Co.*, 319 U. S., 350; *Blair v. Baltimore & Ohio R. Co.*, 323 U. S., 600.

Rather than to leave ultimate fact finding to the jury, *Lavender v. Kurn*, 327 U. S., 645, the trial court speculated to an amazing degree to reach its conclusion as a matter of law. The court went entirely outside of the record to speculate as to other possible situations involving snow, ice and mud over the entire railroad yard. Not only was such speculation outside of the record, it was contrary to uncontradicted evidence! This case concerned a particular working area between two fixed and known places. The record, moreover, conclusively shows that the respondent had long required petitioner and others to go from the one place to the other to service yard locomotives. This case is not concerned with irrelevant situations, as the trial court asserted, where an employee walking at random in the yard slips and falls on ice or where the railroad has no way of knowing where an employee will go. On the contrary, it was respondent who chose the fixed starting point and destination for petitioner's duties. It would certainly be reasonable, therefore, for a jury to conclude that the respondent should have foreseen the hazards of going to and from those places due to the accumulation of snow and

ice. It would likewise be reasonable for the jury to conclude that the respondent should have taken steps to minimize or avoid those hazards.

The contention was made and accepted in the courts below that since no fixed path or line of travel existed between the two known and fixed places of work, the railroad was relieved as a matter of law from the duty to minimize or avoid the obvious hazards presented by snow and ice. This is indeed a strange position in view of the uncontradicted evidence that respondent chose the place from which and to which petitioner was required to go and also chose the manner in which and means by which he was to do his job. In principle this case, therefore, is in conflict with numerous decisions where liability has been imposed on employers for sending a workman to work under known unsafe conditions. Particularly pertinent are those cases applying the foregoing principle where the presence of snow or ice has constituted the unsafe factor. *Schulz, Administratrix, v. Pennsylvania R. Co.*, 350 U. S., 523; *Fugazzi v. Southern Pacific Company*, 207 Fed. 2d, 205; *Skidmore v. B. & O. R. Co.*, 167 Fed. 2d, 54.

Question No. 3.

The trial court failed or refused to recognize the evidence in the record concerning the presence of the roundhouse and the nearby inspection track. In view of the fact that the petitioner reported to duty at the roundhouse and obtained his supplies from a place adjacent to the roundhouse, it cannot be disputed that the servicing of the locomotive in the roundhouse or on the nearby inspection track under the weather conditions present would have been much safer. While such servicing may have been more time consuming, still the question is whether under such

extreme weather conditions the railroad should have employed the safer place of servicing the locomotives. This was clearly one for the jury. The directed verdict in this case, therefore, was in conflict with numerous decisions that a jury issue is presented when there is basis for a finding that a safer method or means of doing the job is available. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U. S., 407; *Boston & Maine R. Co. v. Kyle*, 156 Fed. 2d, 112; *Boston & Maine R. Co. v. Mecch*, 156 Fed. 2d, 109; *Atchison, Topeka & Santa Fe R. Co. v. Studer*, 214 Fed. 2d, 250; *Rothwell v. Pa. R. Co.*, 87 Fed. Supp., 706.

CONCLUSION.

The Ohio courts have erected a judicial barrier in that state between an injured workman and his right to trial by jury of a federal claim. Not only is that right "part and parcel of his remedy under the Federal Employers' Liability Act," but it is also preserved by the Seventh Amendment. *Schulz, Administratrix, v. Pennsylvania Railroad Co.*, 350 U. S., 523.

Even if this were the first case where injury or death was caused in part by the elements of weather, this court should act without hesitation to preserve petitioner's fundamental right; for one court-made exception to a jury trial leads to another. This, however, is not the first such case, and at least two different United States Courts of Appeals on strikingly similar and indistinguishable facts have upheld the right to trial by jury. It becomes, therefore, more imperative that this court sweep aside the barrier imposed by the Ohio courts. That is the only action which will preserve to petitioner, and quite probably to others in Ohio and elsewhere, the same constitutional right

to trial by jury which has been accorded in the two other jurisdictions. The writ of certiorari should be granted and the judgment of the Court of Appeals for Franklin county, Ohio, should be reversed.

Respectfully submitted,

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APPENDIX A.

Statement of Trial Court in Directing Verdict For Defendant.

The Court: Now, members of the jury, the defendant has at the conclusion of the plaintiff's case filed a motion requesting the court to direct the jury to return a verdict for the defendant. This action is brought under what is known as the Employers' Liability Act and in substance that provides that a railroad company such as the defendant is must furnish a safe place for its employees to work. Now, that doesn't mean that they shall do the impossible or that they are insurers of everyone who may be injured in the course of their employment. What it does mean is, that they must use the highest degree of care compatible with the business in which they are engaged to provide a reasonably safe or safe places for their employees to work.

Now, this action is predicated upon the claim that the Railroad Company was negligent in permitting the ice to form and negligent in not removing it. I think, knowledge will prompt everyone to the conclusion that it is impossible for the Railroad Company or any other organization to prevent the formation of ice on its property.

To allow recovery in this case would either require that the Railroad Company would have to cease operation when there was ice or they would have to compensate everyone who might be injured. Here is a large area of yards, all of it covered with ice and all of it practically traversed by the many employees there, not only that, but the railroads operating throughout the country, and we all know, I think that very often trains are stalled on the tracks and a brakeman has to get out and walk back. Now, if they were required to compensate every one that might slip

on the ice and be injured, that would mean that they would have to insure over their whole line of travel.

The court is firmly of the opinion, and I never like to direct a verdict, that there is no liability on the part of the Railroad Company in this case, or in other words, that there is no showing of negligence on the part of the Railroad Company; that it has done nothing or failed to do something which railroads generally do under the same circumstances, and as I say to hold them liable in this case would practically require that they would have to cease operation under the conditions that existed there at that time. Now, if they are liable because a man slips on the ice, they would also be liable if he got mud on his shoe and slipped or if the rail was wet and he slipped on that. The law does not contemplate insurance.

Now, the state of Ohio has recognized for many years the liability of industry for accidental injuries to employees and enacted our Workmen's Compensation Law and a person who is injured in the course of his employment, whether he is negligent himself or whether anybody else was to blame, he is entitled to compensation and he can only recover from the company direct if the company is negligent.

Now the Employers' Liability Act limits the railroad company's liability to acts of negligence, that is, to failure to exercise ordinary care, and ordinary care with respect to railroads is the highest degree of care compatible with the business in which they are engaged. The court convinced that no negligence of the defendant has been shown must sustain the motion and direct the jury to return a verdict for the defendant.

So you will retire and sign the verdict form for defendant, and the plaintiff will have exceptions.

APPENDIX B.

Opinion of the Court of Appeals.

(Rendered on the 2nd day of February, 1956.)

Per Curiam:

Having examined the record in this case and briefs of counsel we are of the opinion that no prejudicial error intervened and therefore conclude that the judgment of the Common Pleas Court should be affirmed.

Judgment of the Common Pleas Court affirmed and cause remanded thereto for execution for costs.

Nichols, P. J., and Griffith, J., of the Seventh District, and Foss, J., of the Sixth District, sitting by designation, concur.

APPENDIX C.

Entry of the Court of Appeals.

[Filed February 29, 1956.]

This cause came on for hearing on appeal on questions of law from the judgment for defendant rendered by the Court of Common Pleas of Franklin county, Ohio, and upon consideration of the record and briefs and argument of counsel, the court finds that no error prejudicial to plaintiff-appellant intervened in the Court of Common Pleas.

It is, therefore, ordered and adjudged that the judgment of the Court of Common Pleas be, and it hereby is, affirmed, and the cause is hereby remanded to that court for execution for costs.

APPENDIX D.

In the Supreme Court of the State of Ohio.

LOUIS LUPO,

Plaintiff-Appellant,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, A CORPORATION,

Defendant-Appellee.

Notice of Appeal.

[Filed March 16, 1956.]

Plaintiff-appellant, Louis Lupo, hereby files his notice of appeal to the Supreme Court of Ohio from the decision, order and judgment of the Court of Appeals for Franklin county, Ohio, journalized on the twenty-ninth day of February, 1956, which judgment affirmed the judgment of the Court of Common Pleas for Franklin county, Ohio, rendered in favor of defendant-appellee against plaintiff-appellant.

This appeal is on questions of law and is taken on condition that a motion to certify record be granted by the Supreme Court of Ohio. This notice of appeal is being filed in the Court of Appeals for Franklin county, Ohio, and in the Supreme Court of Ohio.

Alex S. Dombey,
William A. Richards and
C. Richard Grieser,
Attorneys for Plaintiff-Appellant.

Assignment of Error.

[Filed April 9, 1956.]

Plaintiff-appellant, Louis Lupo, says that there is substantial error in the record and proceedings in this cause prejudicial to his rights and files as his assignment of error in this court the following:

1. The Court of Appeals for Franklin county, Ohio, erred in affirming the judgment of the Court of Common Pleas of Franklin county, Ohio, which judgment was rendered for defendant-appellee pursuant to the court's directed verdict for defendant-appellee.

Alex S. Dombey,
William A. Richards and
C. Richard Grieser,
Attorneys for Plaintiff-Appellant.

Motion to Certify Record.

[Filed March 26, 1956.]

Louis Lupo, plaintiff-appellant, respectfully represents that on February 29, 1956, in an action in the Court of Appeals for Franklin county, Ohio, wherein plaintiff was appellant, and being cause No. 5303, on the docket of said court, said Court of Appeals rendered a judgment in favor of defendant-appellee and against this plaintiff-appellant affirming the judgment for defendant-appellee rendered by the Common Pleas Court of Franklin county, Ohio. That required copies of typewritten brief, in due form, together with assignments of error, will be filed in this court as prescribed by the rules of this court.

Plaintiff-appellant represents that he has filed his notice of appeal in the Court of Appeals for Franklin county, Ohio, and in this court as required by law. This case is

one of both public and great general interest, and error prejudicial to plaintiff-appellant has been committed in the proceedings in said Court of Appeals, all within the meaning of Article IV, Section 2 of the Constitution of the state of Ohio; and by reason thereof this court has jurisdiction to and should review and reverse said judgment.

Wherefore, plaintiff-appellant, Louis Lupo, moves this court for an order directing the Court of Appeals for Franklin county, Ohio, to certify the record to this court in said cause.

Respectfully submitted,

Alex S. Dombey,
William A. Richards and
C. Richard Grieser,
Attorneys for Plaintiff-Appellant.

Entry Overruling Motion to Certify Record.

[Dated June 6, 1956.]

It is ordered by the court that this motion be, and the same hereby is overruled.